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Wife's Costs

A POINT of law which husbands as a class do not readily understand, and appreciate even less, is that whereby the legal costs properly incurred by a wife in taking or defending matrimonial proceedings are considered to represent an expenditure on necessaries, so that ordinarily the husband must bear them. While in *Mines* v. *Mines* [1957] 1 All E.R. 667*n* WILLMER, J., did not in the circumstances of the case make any order for costs, he did cursorily examine the application to this situation of the Legal Aid Act. Since legal aid became available the husband is not in many cases the only source to which a wife can look for the means of necessary litigation, but in a proper case the husband may still be ordered to secure or pay her costs as an assisted litigant. The way the learned judge put it was that the legal aid fund, having financed the wife's case, is entitled to stand in the shoes of the wife; and he instanced for comparison the right of the National Assistance Board to claim against a husband for the cost of assistance afforded to his wife. (The latter right is, of course, statutory nowadays.) There is at first sight some novelty in this practical view of the situation. It certainly explains why, as Willmer, J., goes on to say, the fund can be in no better position than the wife, and must lose its right to reimbursement if the demerits of the wife's case are such that the court would withhold costs from her. In previous cases concerning a husband's liability for costs the wife's solicitors have been regarded as contracting with the husband through her intermediation as an agent of necessity (*Michael Abrahams, Sons & Co.* v. *Buckley* [1924] 1 K.B. 903). The difference possibly turns on the fact that there is no contract between the legal aid fund and one of its applicants.

Prison Conditions

OVERCROWDING in prisons, according to the HOME SECRETARY in his speech on 13th March on the Commons' vote of £117,000 for the salaries and expenses of the Prison Commissioners, reached its peak in 1952 when there were 6,000 prisoners sleeping three in a cell. The number recently was a little over 2,000. The number of persons in prison has risen from 20,500 in August to about 21,800 at a recent date. A reduction in the number of long sentences would contribute most to the reduction of overcrowding. Research into methods of treatment, and providing the fullest information to the courts concerning expert diagnosis, past history and personality were necessities. More progress was needed in creating remand centres. Better recruitment for prison officers with a re-assessment of their pay and their conditions of service

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was also necessary. Efforts were being made to get in more work, in consultation with the employers' organisations and the T.U.C., and they were trying to increase opportunities for extra insured employment. There was an improvement in the introduction of new trades, in vocational courses and in prisoners' earnings. This is the most encouraging statement on penal reform we have heard for many years. We hope that Mr. Butler will be able to put it into effect.

Who are "the Public"?

ALTHOUGH the Court of Appeal's decision in *A.-G.* v. *P. Y. A. Quarries, Ltd.* (*The Times*, 16th March), may seem merely to establish the obvious proposition that a public nuisance is a nuisance to the public, in practice it will be a useful guide in future cases, which in modern industrial conditions are bound to recur. "The public" is a conception of varying meanings. Lord Justice DENNING'S judgment went further in defining it in its context than the classic statement of the difference between a public and a private nuisance, which he quoted, that the former affected Her Majesty's subjects generally while the latter affected particular individuals only. "One has to look at the reason of the thing," his lordship said, "and say that a public nuisance is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings at his own expense to put a stop to it, but that it should be taken at the expense of the community at large." If this statement offends against the *petitio principii* rule of logic, the fault is not in the judgment, but in its subject-matter, which calls for a definition of the indefinable. As Lord Justice ROMER said, the question is how widespread must a nuisance be in order to be a public nuisance, and a nuisance to a class of Her Majesty's subjects was certainly a public nuisance. Their lordships unanimously dismissed an appeal from an order by Mr. Justice OLIVER granting an injunction perpetually restraining the defendants from quarrying so as to cause stones or splinters to be projected from the confines of their quarry or to occasion a nuisance to Her Majesty's subjects by dust and vibrations.

Justice Unobserved

IN more spacious days, when national newspapers were larger, they frequently contained short reports of cases in the inferior courts from all over the country—cases that were of more than passing interest to the practising lawyer, even though they contained no novel element in their decision. Now, unless something sensational catches the attention of a news agency, one has to rely on such local newspapers as come one's way for occasional glimpses of the county court judges and magistrates at work on their routine lists. There are often in these local journals interesting illustrations of legal commonplaces. A Portsmouth paper we saw recently reports a county court action for the price of work done under a contract for reconditioning the engine of a lorry. For causes unknown, a bearing was found to have run after the reconditioning. His Honour Judge TYLOR, Q.C., held that the plaintiffs had not made out their claim because the onus was on them to prove that the work of reconditioning had been properly carried out. In the same paper we read of a cyclist accused of disregarding a "Halt" sign. He protested because the policewoman concerned asked him for his Christian name, "which he considered unnecessarily familiar." In a further protest he questioned why it was that the summons was delivered to him at the college where he was a student. "I consider it in the lowest possible taste and damaging to my career," he said. The need for process to be served is indeed a nuisance, both to those who have to do it and to those to whom it is done.

Professional Status

AT a London conference on 9th March arranged by the College of Preceptors, professional persons were defined as those "engaging in an occupation not affiliated to the Federation of British Industries or the Trades Union Congress." The problems that were discussed were mainly those arising out of the changing position of the professions in modern conditions. Mr. W. A. L. RAEBURN, Q.C., reminded his audience that the common origin of the three major professions of divinity, medicine and the law comprehended everyone who was literate (incidentally including all teachers). This simple standard had had no logical successor. Although the major faculties now had traditions "undeniable, respectable, and gloriously exclusive," the modern world would not allow itself to be completely frustrated. The real difficulty, he said, was "to prevent the coinage of professional status from being debased by becoming the legal tender of all kinds of employment in which the elements of learning, public service and discipline are present only to a minor degree." We respectfully agree, and we support the view that professional persons in salaried employment, no matter how powerful their employers, must show no hesitation in following the right course, where their duty to their professional organisation seems to conflict with loyalty to their employers.

Tact in a French Court

WITH the approach of the summer and thoughts of pleasant vacations on the Continent, *Britain-France*, the magazine of the Franco-British Society, in its spring, 1957, issue, publishes an article by an English magistrate on the difficulties that English people face if charged with an offence in France. Trial by a presiding judge who is a paid civil servant, and cross-examination by him, present terrors to the stranger, but when one reads the unbiassed account in this article of the course of a day's business in the court of a local *juge de paix*, it is clear that, whatever the system of law and procedure which prevails, tact, common sense and a quick brain in the presiding judge achieve the usual satisfactory result. One might adapt Pope's words and say that that judicial system is best which is administered best. As the writer puts it: "Each system is best suited . . . to the different temperaments of the two countries."

Mixed Charities

IT is very seldom that a series of articles written more than thirty years ago still continues to be in demand. The late A. H. Withers wrote his articles on "Mixed Charities" for THE SOLICITORS' JOURNAL in 1924 and they were subsequently reprinted in booklet form. The booklet ran out of print many years ago, and readers will remember that the articles were again reprinted, together with an up-to-date commentary by Mr. SPENCER G. MAURICE, in our issue of 8th December, 1956. In response to further requests they have now been reissued in booklet form by The Solicitors' Law Stationery Society, Ltd. (price 4s.).

SERVANTS AND INDEPENDENT CONTRACTORS DISTINGUISHED

A TEST AVAILABLE UNDER THE NATIONAL INSURANCE ACTS

THE distinction between a servant and an independent contractor is of particular importance to a third party claiming damages in tort. If the tortfeasor is a man of straw his status as servant or independent contractor indeed may determine whether or not any compensation will be paid (*Honeywill & Stein, Ltd.* v. *Larkin Bros., Ltd.* [1934] 1 K.B. 191). If he is a servant redress may be obtained against his employer, but generally this is not the case in respect of the principal of an independent contractor (*Penny* v. *Wimbledon U.D.C.* [1899] 2 Q.B. 72; *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392). Right of control is the main test to determine status; in a contract for services the principal can order what is to be done, whilst in a contract of service the employer additionally can determine the method of work. As it has been held (*Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 543) that the distinction between a contract for services and a contract of service is a question of fact, any available guidance in deciding that point in particular cases is welcome. Many relevant decisions are available under the National Insurance Acts. Under the National Insurance Act, 1946, for purposes of compulsory contributions a parallel distinction is drawn between persons employed under a contract of service and self-employed persons. The total contribution in respect of an employee is paid partly by himself and partly by his employer, and his contribution is less than that of a self-employed person; again, an employee is entitled to claim unemployment benefit and is covered under the National Insurance (Industrial Injuries) Act, 1946, as amended, unlike a self-employed person. Under these Acts determination of an insured person's classification as an employed or a self-employed person is amongst the questions reserved for the decision of the Minister of Pensions and National Insurance subject to appeal to the High Court on a point of law by way of case stated. Selected decisions of the Minister are published periodically[1] and some of the relevant ones are summarised in this article.

B.B.C. interviewer; Foreign journalist

Decision M.48 concerned an interviewer of the British Broadcasting Corporation engaged to discover what programmes had been received by members of the public on the day preceding the interview. Remuneration on a fixed scale was paid upon completion of the work. Because no detailed control was exercised over the interviewer, who could work at any reasonable time and choose whom and where to interview, it was held that she was not employed under a contract of service. Accordingly she was not employed in insurable employment and so did not succeed in her claim for industrial injury benefit in respect of injuries suffered whilst carrying out her work. This decision can be contrasted with that of M.33 concerning an Italian citizen ordinarily resident in this country who acted as a journalist for two Italian newspapers successively. This journalist devoted substantially the whole of his time to the work of supplying news and writing special articles for the newspaper in question, which he had to visit once or twice a year in Italy for short spells as the paper had no office in the United Kingdom. Although it is apparent that no day-to-day control was exercised by the newspaper over him, nevertheless he was held to be an employed person.

Timber fellers

In M.40, a company made verbal agreements with two timber fellers, called in the report *X* and *Y*, whereby each was to work in a team of two or more men to cut down trees in accordance with the company's instructions. Payment was to be made according to the amount of timber felled by the team as a whole. At times the company's timber buyer gave orders to the men individually and reprimanded any man responsible for a bad piece of work. *X* was paid by the company on the basis of a weekly return of timber felled, and, after paying his team, he shared the remaining balance with *Y*. *X* and *Y* were held to be employed persons and in insurable employment, and the company was liable to pay employer's contributions even in respect of *Y*. In M.34, a timber feller, who undertook to cut timber and clear sites for a firm of timber merchants, was paid weekly on a piece-rate basis. The firm required him to have an experienced assistant and his son acted as such. Both were skilled fellers, were treated equally by the firm's general manager and shared their remuneration equally, and the father did not give his son any instructions about the work. On his weekly visit to the site, the firm's manager would show which area was next to be dealt with and upon occasion would express the view that certain particular tree trunks were insufficiently smoothed. Both were held to be self-employed and not in insurable employment under the Industrial Injuries Acts.

Quarry worker; cutlery outworkers

In M.13, a slate quarry labourer worked in conjunction with the management of a quarry company, was paid piece-work rates monthly and accepted the general supervision of the quarry manager. He kept the same hours as other workmen although he was not bound to do so, but worked at his own risk. The finding that the worker was not in insurable employment precluded a claim under the Industrial Injuries Acts in respect of the worker's death as a result of an accident occurring whilst he worked at the quarry. In M.35, two brothers, in partnership as cutlery outworkers, worked for a company in its grinding shop. They paid rent for the premises and electricity charges and received piece-work rates from the company. The company exercised no control over the manner of working and after one partner retired the remaining partner controlled the employment of his workers. After paying them, he retained for himself the balance of what sums were received from the company. The partner was found to be self-employed and to be the employer of a worker whom he had engaged after her application to the company for employment as a scissors glazer had been referred to him and he had discussed terms of employment with her.

Professional sportsmen

M.50 concerned a partner in a motor-cycle business who obtained a contract from a company to enter motor-cycle

[1] *Selected Decisions of the Minister on Questions of Classification and Insurability* are published at irregular intervals in a series of pamphlets numbered M.1, M.2, etc. The latest pamphlet, M.7, was published in June, 1956. Each decision reported in this series is numbered consecutively from M.1, in the first pamphlet dated May, 1950, to M.56 in the latest one.

races and competitions as directed by the company and to use such motor cycles, fuel and accessories as it directed. The motor cyclist was to receive prize money and money paid by the manufacturers of equipment that he used, but the company also guaranteed him a minimum remuneration and was entitled to his obedience to its lawful orders. No arrangement was made for the contract's termination in case of the motor cyclist's sickness. Normally, the motor cyclist was occupied in his own business from autumn to spring and worked under the contract only in the racing season during the remainder of the year from April until October. In May, 1953, he suffered an injury whilst practising and the company paid him the guaranteed remuneration until the end of the year notwithstanding his intention to return to his own business in October if he had been fit. He was held to have been employed under a contract of service throughout the year, included in the class of employed persons and covered by the Industrial Injuries Acts at the time of the accident. In M.51, the Lawn Tennis Association appointed a professional lawn tennis area coach and gave his name to local education authorities, etc., which engaged him and paid part of his fee, the whole of which was guaranteed by the association. The coach was not supervised in his work and was held to be a self-employed person.

Hospital specialist; hospital chaplain

In view of pronouncements in the High Court about the status of hospital specialists (cf. 98 SOL. J. 628, 644), it is instructive to notice decisions M.42 and M.52. The first concerned a retired medical officer of health whose only subsequent employment was that of part-time specialist to a hospital under an appointment made by a regional hospital board. Apparently this case was referred to the Minister because of difficulty in construing certain National Insurance regulations. The Minister held that the part-time specialist was self-employed and not employed in insurable employment under the Industrial Injuries Acts. The same ruling was made in M.52 relating to a whole-time chaplain appointed by the management committee of a mental hospital at an annual salary, subject to three months' notice on either side. Features of the chaplain's employment included his receiving a list of his main duties and a daily list of patients that he should visit, with periodical advice from the medical superintendent as to his best approach to certain patients. He lived outside the hospital, but was allocated an office inside and in fact observed fixed hours of attendance though not formally instructed to do so. He received permission from the medical superintendent for taking time off extra to that originally arranged and made quarterly reports to the hospital management committee from which he received advice.

Application of decisions to other problems

Minister's decisions are made within the meaning of the National Insurance Acts and in no way bind the courts. It is appreciated that the criteria for these decisions may not be completely parallel to factors which a court must consider in cases involving contracts of service or contracts for services such as certain actions in tort by third parties. Nevertheless, it is submitted that many features of any case are relevant for either purpose. Although some of the Minister's decisions are not easy to reconcile with each other,[2] it is a fact that up to date the Minister has been upheld in every case subjected to an appeal in the High Court.

It follows that a formal determination by the Minister as to the status of any alleged employer of a tortfeasor may be an excellent guide to the likely finding of the court on the question of whether a party involved in a dispute is an employee or an independent contractor. Such a formal determination can be obtained without charge upon application to the Minister under the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144), reg. 3, or the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1299), reg. 2. As with judicial processes generally, there may well be an interval of many weeks between filing an application and obtaining a formal ruling. Subject to this legal advisers concerned with cases involving questions of independent contractor status may find it worthwhile to consider making use of this procedure.

N. D. V.

[2] Cf. article entitled "The Minister of National Insurance as a Judicial Authority," by N. D. Vandyk, published in the winter, 1953, issue of *Public Administration*, p. 331 *et seq.*, especially the group of cases discussed under the heading of "Part-time or Casual Labour," at p. 339 *et seq.*

SOCIETIES

The SOLICITORS' ARTICLED CLERKS' SOCIETY announces the following programme for April, 1957—4th April: Scottish Reels at The Law Society's Hall, 6.30 p.m. Refreshments available. 8th April: Debate. The society are the guests of the United Law Debating Society at the Gray's Inn Common Room. Debate starting 6.30 p.m. 16th April: Skating Party meet Patrick Wright on the ice at the Queensway Club (opposite Queensway tube station) at 6.30 p.m. 25th April: Theatre Party. Tickets and information may be obtained from CUN 7623. SPORTS DIARY—3rd April: Hockey. S.A.C.S. *v.* Chartered Accountants Students Society at Richmond Athletic Ground. Contact Charles Dorman, CHA 6784. 10th April: Rugger. S.A.C.S. *v.* Chartered Accountants Students Society. Contact Richard Weston, FLE 9201.

At the annual general meeting of the BLACKBURN INCORPORATED LAW ASSOCIATION, held on 28th February, Mr. G. Haworth was elected president in succession to Mr. N. Lees, and Mr. G. Wightman was elected vice-president. Mr. A. Carter and Mr. J. W. Hollows were re-elected hon. treasurer and hon. secretary respectively.

The eighty-first annual general meeting of the BRADFORD INCORPORATED LAW SOCIETY was held at the Midland Hotel, Bradford, on 13th March, when the following officers were elected—president: Mr. Stanley Ackroyd; senior vice-president: Mr. Geoffrey H. Hall; junior vice-president: Mr. R. W. Firth; joint hon. secretaries: Mr. R. W. T. Vint and Mr. Charles P. Pickles.

At the eighth annual dinner of the MID-SURREY LAW SOCIETY, held at the Berkeley Rooms, Putney, on 8th March, Sir Edwin Herbert, President of The Law Society, Mr. T. G. Lund, Secretary of The Law Society, and Mr. J. Boyd-Carpenter, the Minister of Pensions, were among the distinguished guests.

At the annual dinner of the SHROPSHIRE LAW SOCIETY, Sir Edwin Herbert, President of The Law Society, Sir Malcolm Hilbery, Judge of the Assize and His Honour Judge D. E. P. Evans, Q.C., were among the distinguished guests.

THE OCCUPIERS' LIABILITY BILL—II

THE NEW CATEGORIES OF VISITORS

WE said in our last article (*ante*, p. 237) that, although the new Bill accepts the position that the distinctions between invitees and licensees at common law have been dissolved away by recent decisions, and will enact that a common duty of care shall apply to all visitors, nevertheless there will be a greater number of categories of visitors, taking the Bill as a whole. This result obtains from a number of other provisions which will now be set out, but these categories are not all categories of differing duty as were the trio of trespasser, licensee and invitee.

First, as was mentioned before, an exception is allowed in the case of an agreement between the occupier and the visitor; the Bill contemplates that the agreement may extend, restrict, modify or exclude his duty to any visitor (cl. 2 (1)). This may be done by agreement *or otherwise*, and it is assumed that "otherwise" allows for such a method as a notice on the gate or the like.

Secondly, the possibility of various categories is allowed for by the fact that the common duty of care depends on the circumstances. Clause 2 (3) deals with the question what circumstances may be relevant and expressly mentions by way of example (*a*) children and (*b*) special risks ordinarily incident to the occupation of the visitor. This latter case would obviously cover such persons as window cleaners.

Thirdly, in considering whether the duty has been discharged regard is to be had to all the circumstances including (*a*) whether a visitor has been warned, though the warning is not, without more, to absolve the occupier unless it was enough in the circumstances, and (*b*) the occupier's freedom from liability for the acts of independent contractors if the occupier acted reasonably in entrusting the work to the contractor and had taken reasonable steps to see that the work had been properly done (cl. 2 (4)).

Fourthly, the occupier may plead *volenti non fit injuria* as a defence where applicable (cl. 2 (5)).

Next, persons who enter in the exercise of a legal right will have the benefit of the common duty of care, whether they have in fact been permitted to enter or not (cl. 2 (6)). (This does not strictly create a separate category: it brings a group into the common fold.)

Fifthly, persons entering public parks (under the National Parks and Access to the Countryside Act, 1949) are not to be deemed visitors (cl. 1 (4)).

The effect of these provisions is that, although a common *standard* is to be applied, nevertheless because the *circumstances* are to be considered, and because of other matters enumerated above, we get (i) the contractual visitor, (ii) the ordinary visitor, (iii) the child visitor, (iv) the skilled tradesman visitor, (v) any visitor to whom other special circumstances may apply (this may develop into various categories), (vi) the warned visitor, (vii) the visitor injured by an independent contractor where one has to consider whether the occupier has fulfilled his duties mentioned above as regards the contractor, (viii) persons entering public parks, (ix) trespassers who, remain a separate category not mentioned in the Bill. Except for the first one and the last two, it is emphasised that the *duty* is common, but its application is likely to produce differing results in these various cases.

There are also special provisions to deal with persons entering premises where the occupier has a contract with another person such as their employer, and to deal with the problems arising between landlord and tenant. Further, it is provided that the rules shall apply to entry on to fixed or movable structures, and to damage to property.

The special provisions concerning third parties entering premises, where the occupier is bound to permit them to enter by virtue of a contract, is that the duty of care which the occupier owes them as his visitors *cannot be restricted* or excluded by that contract. Moreover, in so far as the contract imposes on the occupier a higher duty of care than the common duty of care, that higher duty shall be owed to the third party even though it was not undertaken for his protection; but in regard to this the contract may exclude this higher duty to third persons (cl. 3 (1)). This provision is partly retrospective (see cl. 3 (5)).

Where, however, there is a contract between A and B under which A as occupier owes a duty to B as a visitor, and C is a person who under the above section would be entitled to protection under the contract, A is not to be liable to B, in respect of faulty execution of work by an independent contractor, by virtue of the contract (cl. 3 (2)).

This third section of the Bill giving third parties the same right as the parties to the contract applies also as between landlord and tenant (including statutory tenancies), i.e., if either the landlord or the tenant is bound to permit persons to enter premises of which he is the occupier, the provisions of s. 3 shall apply as though the tenancy were a contract between landlord and tenant.

There is a separate clause (cl. 4) to deal with the landlord's liability in virtue of his obligation to repair. In effect, the common duty of care is imposed on a landlord towards all persons who, or whose goods, are lawfully on the premises in respect of dangers arising from any default by him in carrying out that obligation. This duty arises where the landlord, under the terms of the tenancy, is liable for the maintenance or repair of the premises. The same rules apply between sub-tenant and mesne landlord, and between mesne landlord and head landlord (cl. 4 (2)), but do not apply at all in respect of unauthorised user (cl. 4 (3)). What is default is defined in cl. 4 (4)), and by cl. 4 (8) the provisions are made retrospective.

It may well be asked whether the result of such a statute will not make the law more complex than it was. The answer, it is submitted, is in the negative, for the complexity, if such it is, arises not from the law but from the facts. The real trouble with the common law arises from what Salmond calls "the strait jacket" of the two categories of invitee and licensee in which all lawful visitors had to be fitted (leaving aside the contractual visitor, who is, of course, governed by the contract). The new provision is more flexible and will, in consequence, allow of justice being more readily achieved. We may alter the law as we will, but the complexity of facts is indomitable. Even under the common law there were really some seven classes as enumerated and set out in the Committee's report at pp. 16–20.

The significance of these changes will be considered in a concluding article.

L. W. M.

Mr. J. S. TEMPLETON, Senior Crown Counsel, Kenya, has been appointed a Puisne Judge in that territory.

A Conveyancer's Diary

LAW REFORM COMMITTEE'S REPORT ON PERPETUITIES

I REMEMBER reading somewhere that the first report of the Real Property Commissioners was greeted with great excitement on the part of the legal profession when it was issued in 1829. The generation of lawyers in practice to-day has had other, and in some ways greater, things than reports on the state of our law of property to stimulate its nervous system, and a similar manifestation could hardly have been looked for on the occasion of the appearance of the report* which is the subject of this article. But the marked lack of interest which I have found among my colleagues on this subject is unexpected. The rule against perpetuities, with its ancillaries, the rules against inalienability and excessive accumulation, is an important part of our law of property, to be overlooked in its present form when any but the simplest and most immediate assurances of property are being settled only at the risk of the whole transaction failing to take effect; and if the committee's proposals are accepted either wholly or partially conveyancers will have to do a good deal of re-thinking. The report is a long one for such a subject, and doubtless makes stiff reading, in parts at any rate, to anyone who has not had the opportunity of brushing up his knowledge of the rule recently (e.g., by reading the recent monograph on the rule by Dr. Morris and Professor Barton Leach, which I recommended to readers of this "Diary" a few months ago). I propose in this article and in one or two more which will appear at intervals in the course of the next few weeks to draw attention to the main recommendations of this committee. (In speaking of the lack of interest so far shown in the report I have not overlooked the spirited comments which it evoked in "Talking 'Shop'" a few weeks ago, at p. 105, *ante*. But my purpose is different. "Escrow" was for the most part publicising the defects (as they seemed to him to be) in some of the recommendations: I want to publicise some of the recommendations themselves.)

The permitted period

The report starts with the committee accepting the necessity for placing some time limit on the vesting of future interests, a necessity which is taken to be beyond argument, and the first question for examination is the length of the permitted period. The conclusion of the committee is that in general the length of the period should not be altered. It was evolved, it is pointed out, by the courts over a long period during which the traditional forms of family settlement were taking shape. To-day, the impact of the revenue laws has caused the traditional type of family settlement to wane in popularity; but the period of lives in being and a further twenty-one years is still convenient as it is the period during which parents may have a family, and the family attain full age. A period which has grown out of the provisions commonly to be found in wills and trusts has, the committee suggests, that much to commend it, and in the absence of compelling reasons (and none are seen) the committee prefers to leave the permitted period as it is, subject only to the provision of an optional alternative.

As to that, one suggestion which was made to the committee was that the period based on lives in being should be wholly abolished and replaced by some fixed period of years, such as sixty or eighty years. The section of the report in which this suggestion is considered immediately follows a section dealing with what are called "royal lives" clauses, i.e., clauses whereby the permitted period is stretched to its utmost by the use of arbitrarily selected lives, such as the lives of all issue of His late Majesty King Edward VII (or King George V) living at the relevant date. Such clauses are an almost standard component of the long and wide (and, from the revenue point of view, not at all unhandsome) discretionary trusts which are so popular to-day. The committee recommends no change in regard to "royal lives" clauses, but it does point out that such clauses can not only render trusts very long lived, but can also postpone the vesting of interests for a very long time, in which case the inconvenience of such a clause may be very considerable. Nevertheless, the committee rejected the suggestion to substitute a fixed period of years for the period based on lives; it saw few attractions in the proposal, and regarded it as undesirable to compel draftsmen to abandon the lives of beneficiaries and others connected with the limitations as providing lives in being as a measure of the perpetuity period. But most draftsmen, it is thought, unless expressly instructed otherwise, would prefer the certainty of a fixed period of eighty years to the difficulties (examined in detail in the report) inherent in a "royal lives" period. This, then, is the genesis of the committee's recommendation that the perpetuity period shall be such a period of years, not exceeding eighty years, as may be specified in the instrument creating the limitation, but that if no such period is specified the period shall be the existing perpetuity period.

Improbable but possible events

Accepting, then, the main basis of the rule, the committee turned to consider the removal of the principal defects in its application which time had exposed. The principal methods of reform which were considered by the committee and formed the subject of some of its recommendations were two. First, to provide that in the operation of the rule the occurrence of events which are theoretically possible but in practice impossible or at least highly improbable should be disregarded. And, secondly, to abolish the present inflexible requirement that the validity of any limitation must be tested *ab initio* in relation to possible events, and substitute for it a "wait and see" principle which would determine validity on the basis of actual rather than possible events.

As regards improbable but possible events, the major cause for complaint against the rule is stated to be that it totally invalidates a limitation *ab initio* if there is any possibility of it failing to vest (if it vests at all) within the permitted period; the report contains a number of cases where a limitation has been held invalid merely because there is a faint theoretical possibility that the period might be exceeded. Attention is called to the common-law rule (the principle adopted for administrative purposes in the Chancery Division is different: see the cases conveniently gathered together in Underhill's Law of Trusts and Trustees, 10th ed., p. 427) whereby the courts have, since *Jee* v. *Audley* (1787), 1 Cox Eq. Cas. 324, for the purposes of the rule against perpetuities, refused to regard a woman as incapable of having children, however old she

* Law Reform Committee. Fourth Report (The Rule against Perpetuities). Cmnd. 18, H.M.S.O., 1s. 6d. net.

may be. Thus, in *Ward* v. *Van der Loeff* [1924] A.C. 653, a gift to such of the children of the testator's brothers and sisters as should attain twenty-one was held by the House of Lords to be void because at the testator's death the testator's parents were living, and although both were aged 66 it was deemed possible that they should have further children and the gift might therefore not vest until twenty-one years after the death of a child unborn at the testator's death. Other instances of " fictional possibilities " given in the report which may make void a limitation which otherwise would be valid include the possibility of a person domiciled abroad lawfully marrying beneath the age of sixteen years (the committee doubtless had *Re Gaite* (1949), 93 SOL. J. 148, in mind when giving this instance), or the possibility of a person having a child after he or she had for medical or surgical reasons become incapable of procreating or bearing issue (cf. *Re Wohlgemuth* [1949] Ch. 12). The committee was agreed that such impossible " possibilities " ought not to be permitted to invalidate a limitation, subject to safeguards for exceptional cases in which, for example, a girl of thirteen or a woman of fifty-five is demonstrably pregnant.

Recommended rules for determining infringement

The committee accordingly recommends that for the purpose of determining whether any limitation infringes the perpetuity rule the following rules should apply. First, that there should be a presumption, rebuttable by any evidence to the contrary tendered at the time at which the matter falls for decision (but not subsequently), that (i) no woman who has attained the age of fifty-five years is capable of bearing a child, and (ii) a male or female who has not attained the age of fourteen years is incapable of procreating or bearing a child. Secondly, that medical or surgical evidence that a male or female of any age is incapable of procreating or bearing a child should be admissible in any court to establish such incapacity, and that the court should be empowered to accept such evidence of a high degree of improbability of procreation or child-bearing as it thinks proper as establishing such incapacity. And it is further recommended that any decision of a court in which any such presumption is applied or any such evidence is accepted should, in the usual way, remain effective, notwithstanding that the subsequent birth of a child rebuts the presumption or shows the evidence to be erroneous ; but that it should be made clear that if the child has any right to any property that in the event is not itself void for perpetuity, that right (including any right to follow or trace the property) is not prejudiced by the decision of the court.

This is one-half of the main recommendation of the committee on the perpetuity rule. The other half (that a " wait and see " principle be adopted) will have to await examination on another occasion.

" A B C "

Landlord and Tenant Notebook

VALUATION LIST QUESTIONS

CAN a landlord be prejudiced by some action taken by his tenant with regard to the valuation list, he being kept ignorant of what was going on ? The question is one to which—as is often the case—justice cannot be done without reference to history ; for both the law of landlord and tenant and that of rating are influenced by the past.

Landlord and tenant law bears traces of feudal conditions, of the " protection attracts allegiance, allegiance attracts protection " rule. A landlord is obliged not to derogate from his grant, and may be found so to have derogated without infringing any of the terms of the tenancy. Disclaimer of his landlord's title exposes the tenant to the risk of forfeiture, though no forfeiture clause mentions such an event. And failure to notify his landlord of proceedings for ejectment brought by a third party makes him liable for three years' " improved or rack-rent of the premises " : Law of Property Act, 1925, s. 145 (replacing the Distress for Rent Act, 1737, s. 12).

Rating law began when, the monasteries having been dissolved by her father, the " Statute of Elizabeth," 43 Eliz. I, c. 2, was passed. It is also known as the Poor Relief Act, 1601 ; it had, apparently, been decided by then not only that the poor must live (a proposition queried at a much later date) but that it was the business of the non-poor to help them. Liability was imposed on every inhabitant, parson, vicar and other, and on every *occupier* of lands, houses, tithes impropriate or propriations of such tithes, coal mines or saleable underwoods in each parish ; the primary liability was for the expense of buying flax, hemp, wool, thread, iron and other necessary ware and stuff to set the poor on work ; but it was also for competent sums of money for and towards the necessary relief of the lame, impotent, blind and such other among them being poor and not able to work.

It will be observed that in the Statute of Elizabeth, the small acorn from which so mighty an oak was to grow, one could be made liable as an inhabitant, and one could be made liable as an occupier. But not as an owner.

The liability of an inhabitant as such was never a practical proposition, and ceased in theory as well as in practice when the Parochial Assessments Act, 1836,* was passed. The non-liability of owners as such was established quite early in the day, by *Sir Anthony Earby's Case* (1633), 2 Bulst. 354.

But (i) the Poor Rate Assessment and Collection Act, 1869, s. 1, entitles " lessees for short terms "—which means terms not exceeding three months, but includes weekly tenancies (*Hammond* v. *Farrow* [1904] 2 K.B. 332) to deduct rates from rent ; (ii) the Rating and Valuation Act, 1925, s. 11 (as amended by the Local Government Act, 1948, s. 55, and the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 15 and Sched. VII, Pt. II), provides for the rating of owners instead of occupiers in certain cases ; and (iii) the terms of a tenancy may impose liability for rates on the landlord.

In these three cases, the landlord is obviously financially interested in the amount of the rateable value. Also in the description of the premises, which may affect the measure. And he may be a local resident, or he may live far away, or be at times engaged in exploring parts of the world where rates are unknown. The questions to be considered, then, are what can he do and what has to be done by authorities to safeguard his interest ; and what duty, if any, does his tenant owe him to safeguard that interest ?

The stages

A new valuation list is prepared by the valuation officer, and may, in the event of any "material change of circumstances," be altered before it is to come into force. A current list may be altered in consequence of the making of a "proposal" (Rating and Valuation (Miscellaneous Provisions) Act, 1955, ss. 1, 2).

The question is, therefore, what opportunity has a landlord of any of the three classes, or what opportunity must a tenant give his landlord, of knowing what is going on at these various stages, and what right has he to take part in the proceedings?

Landlord rated as owner

The provisions by which owners of classes of hereditaments may, compulsorily or by agreement, be rated instead of the occupiers, are to be found in the Rating and Valuation Act, 1925, s. 11, the Local Government Act, 1948, s. 55, and the Rating and Valuation (Miscellaneous Provisions) Act, 1955, Sched. VII, Pt. I; and by the Local Government Act, 1948, s. 66, every such owner "shall, without prejudice to the rights of the occupier . . . be treated for the purposes of this Part of this Act relating to objections, proposals and appeals as standing in the same position as the occupier." This fairly disposes of the question as regards that category.

Other landlords

In practice, many landlords affected by the Poor Rate Assessment and Collection Act, 1869, will be compulsorily or voluntarily rated as owners, and enjoy the rights mentioned above. But, for those who are not rated as owners, the right to information, as far as statute law is concerned, appears to be as follows.

What might be called the publicity arrangements for new valuation lists are now contained in the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 1 (6): it shall be the duty of the rating authority . . . to take such steps *as the authority may consider most suitable* for giving notice of the list, and of the rights of persons to inspect the list and to make proposals for altering it. A somewhat vague duty. It presupposes a right of inspection, though the old provision expressly creating that right (Local Government Act, 1948, s. 35 (2)) was abolished by the same statute.

Then, no right to make a proposal for alteration is expressly conferred on a ratepaying or other landlord. But "any person aggrieved" by an inclusion of property, by the value ascribed or by any statement made or omitted in the list with respect to a hereditament, or by the valuation as a single hereditament of a building occupied in parts, may make a proposal (Local Government Act, 1948, s. 40 (1)); and the "statement made or omitted" ground is likely to be very important in view of the current tendency to differentiate between classes of property. Authority for the proposition that a ratepaying landlord is capable of being aggrieved can be found in *R.* v. *Brentford Union; ex parte Herring* (1907), 96 L.T. 704. In that case, the person rated was actually a tenant who had expressly undertaken to pay the rates but, for some mysterious reason, the name of a manager whom he had appointed and the names of that manager's two brothers appeared in the rate book, and the committee who then heard objections refused him a hearing. The Divisional Court granted a writ of mandamus, holding that once the applicant had satisfied the committee that he would have to reimburse the ratepayer, he was aggrieved, and they must hear his objection. Incidentally, the enactment then in force did not actually say "any person who *is* aggrieved," but the Divisional Court appears to have interpreted the expression "any person who feels himself aggrieved" as if the feeling had to be justified. When a tenant has a statutory right to deduct rates, it could, in the face of this authority, hardly be doubted that the "short term" landlord would have a right to object; the position of a covenantor landlord is less easy to determine, but may be considered "covered."

Further, the interest of a landlord may be said to be clearly recognised by s. 41 of the Local Government Act, 1948, as amended by s. 2 and Pt. I of Sched. I to the Rating and Valuation (Miscellaneous Provisions) Act, 1955, dealing with proceedings on proposals. By para. (2) of that Schedule, the valuation officer is to transmit a copy of the proposal to the *occupier* of the hereditament concerned; by para. (3), the *owner or occupier* may serve notice of objection. And, if agreement is negotiated, such a person must be a party to it: *ib.*, Pt. II, para. (8).

The position does appear to be that, while ratepaying landlords have rights which are recognised, it is possible, though not probable, that their interests might be affected without their knowledge. The provision for taking such steps as the authority may consider suitable is not altogether satisfactory, and the only way in which a landlord might protect himself would be by an appropriate clause in the tenancy agreement obliging the tenant to keep him posted.

R. B.

DEVELOPMENT PLAN

County of Middlesex Development Plan

Proposals for alterations or additions to the above development plan were on 11th March, 1957, submitted to the Minister of Housing and Local Government. The proposals relate to land situate within the borough of Wood Green, in the county of Middlesex. Certified copies of the proposals as submitted have been deposited for public inspection at the Town Hall, High Road, Wood Green, N.22, and also in the County Planning Department, No. 10, Great George Street, Westminster, S.W.1. The copies of the proposals so deposited together with copies or relevant extracts of the plan are available for inspection free of charge by all persons interested at the places mentioned above between the hours of 10 a.m. and 4.30 p.m. on Mondays to Fridays and 9.30 and 12 noon on Saturdays (except in the case of the copy deposited in the County Planning Department which will not be open for inspection on Saturdays). Any objection or representation with reference to the proposals may be sent in writing to the Secretary, Ministry of Housing and Local Government, Whitehall, London, S.W.1, before 30th April, 1957, and any such objection or representation should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the Clerk of the Middlesex County Council, Guildhall, Westminster, S.W.1, and will then be entitled to receive notice of any amendment of the plan made as a result of the proposals.

NEW BUSINESS NAMES REGISTERED IN 1956

During the year ended 31st December, 1956, there were 28,062 new registrations under the Registration of Business Names Act, 1916, as amended by the Companies Act, 1947, bringing the total number on the register to 939,542. Ten prosecutions were instituted during the year for non-compliance with the provisions of the Act. Convictions were obtained in nine cases.

HERE AND THERE

SOUTH UIST AGAIN

ABOUT a month ago unpleasant noises were beginning to reach London from the direction of far away South Uist, lost in the mists of the Atlantic. But the prospect of South Uist was even more profoundly obscured in that smoky unhealthy cloud that enwraps so many of the proceedings of Whitehall, the same cloud that settled so disastrously on the crest of Crichel Down. And the winds blowing in from the sea are somewhat unsettling that mist, and the half-glimpsed shape of things done and things intended has a decidedly sinister look. In 1955 the proposal to inflict the alien intrusion of a rocket range on one of the few remaining prosperous and well-populated islands in the Hebrides met with uncompromising opposition from the crofters themselves and from a dozen responsible quarters in Scotland and elsewhere. Officials made soothing pronouncements, represented their requirements as being limited to a mere 200 acres, promised an inquiry and begged objectors to contain themselves until it occurred. Lulled with a false security, the objectors waited in silence, but Whitehall went underground to emerge in due course with a *fait accompli*, a demand for 1,500 acres and a bland announcement that no public inquiry was necessary, since there had been no responsible objections. In legal practice one occasionally meets the sort of potential defendant who, with expert knowledge of the running of the Statute of Limitations, enmeshes an aggrieved person in promising but protracted negotiations until he is out of time for making his claim and helpless, but one prefers not to think that that is an approved and recognised technique in Government departments. Anyhow, South Uist and its friends are rallying their forces for its defence. The crofters on the Uists and Benbecula have formally asked the Secretary of State for Scotland to order a public inquiry. Their clergy, Roman Catholic joining in alliance with the Church of Scotland, have written a letter suggesting that an inquiry is being avoided because " the whole truth is too monstrous to be revealed." Mr. Malcolm Macmillan, M.P. for the Western Isles, has joined with seven other Scottish Labour Members to table a motion calling for a full inquiry. In answer to his suggestion of a plebiscite, Mr. Charles Orr-Ewing, the Air Under-Secretary, said that talks could be arranged between Government officers and the crofters " if that would help to remove apprehension." In view of past experiences, it is hard to see how anything can remove apprehension except the truth, the whole truth, frankly and honestly brought into the open light of day.

CROFTERS' BATTLE DAY

IT may not be altogether irrelevant to recall the scandal created in 1882 when large-scale evictions on Skye massed the crofters to open rebellion. Summonses were served, but the documents were burnt and the Sheriff-officer assaulted. You can read all about the sequel in Dr. Norman Maclean's delightful book on the island, " The Former Times." Sheriff Ivory, the not particularly distinguished son of a judge of the Court of Session, decided on a demonstration of force, and borrowed fifty policemen from Glasgow. No other police authority would help him. They succeeded in arresting six men, but on the way to Portree they were ambushed by a crowd of men and women and a pitched battle occurred, flints and clods against batons. The organised forces of law were, it is true, victorious, but ultimately at Inverness the prisoners were received by cheering crowds and fined the smallest possible sums, which were paid by the Inverness Liberals. But the news of " the Battle of the Braes " had repercussions in London. As Dr. Maclean tells: " Questions rained on the Government in the House of Commons; the upholders of the Rights of Man everywhere lifted up their voices. Newspapers and publicists in France proclaimed their fiery indignation. Here was the real John Bull, the champion of freedom and justice at the ends of the earth, trampling at home on the rights and freedom of the men who fought his battles. What arrant hypocrisy . . . The nation could not lie down under that charge. The usual steps were taken; a Royal Commission and deliverance followed . . . The victory to all appearance lay with the Sheriff and his blue-coated men at the battle in the Cumhag. But the fruits of victory lay with those who there put up a fight for the Rights of Man." At the final test, will 1957 prove less oppressive or more oppressive than 1882?

WELL-MEANT TYRANNY

THERE are those who really think that because some action is lawful it cannot be tyrannous. That was precisely the mistake that Charles I made, but the two conceptions are not antithetical. Charles always acted with the best intentions in the world and on the best legal advice, yet he was constantly exhibiting one of the most conspicuous marks of a tyrant; he took his subjects' goods without their consent. It was that characteristic which repelled Western European visitors in the regime of contemporary Turkey, that no man was " lord of the house wherein he dwelleth or of the land which he tilleth longer than it pleaseth the Sultan." Hence this tyrannical government discouraged men from trading and tillage and improvement of their estates, as " knowing all their gettings to lie in the Grand Signeur's mercy." This business of taking away a man's land or livelihood by law does not alter its quality because it is authorised by Act of Parliament, and one may ask with the character in the novel: " Do you think because you go up to London and settle it with the Lords of Parliament and bring back a lot of papers and long words, that makes any difference to the man you do it to? By what I can see you are just a bad and cruel master like those God punished in the old days." No doubt there may be rights and wrongs on either side in each particular case, but it is precisely when the conviction arises that power is determined to have its way irrespective of rights and wrongs, that the village Hampden is raised up, that men start tilting at pylons like Don Quixote at windmills, that Jack draws his pigmy sword on the giant. To-day, as in the 17th century, there is in our complex society a tremendous demand for government and the executive has responded with alacrity. At present it is the fashion to justify every invasion of personal right and liberty in the name of " production." Whether people recognise it or not, it is a Marxist conception that " production " *à outrance*, production overriding every other consideration, human or divine, is the road to the supreme good, and that leads straight to the totalitarian State. For that reason one should be vigilantly suspicious of all attempts to make things easy for the big machine, so much more menacing to human life than big battalions, for battalions pass but the machine remains. One should not too complacently accept the steps being taken in Parliament to make compulsory purchase even easier than it already is—

to give prospecting officials new powers to enter on land, to cut by two-thirds the time during which draft orders for the closing and diversion of highways shall be available for inspection. The schemes involved may change the face of a whole landscape, uproot the settled way of life of a whole community, probably a remote and defenceless community. Save in a frankly tyrannical State these things should not be done secretly or without deliberation or by a sort of bureaucratic prestidigitation in which a quickness of the hand deceives the public's eye.

RICHARD ROE.

TALKING "SHOP"

March, 1957.

ASH WEDNESDAY

Amongst clients there are those who worship the written word and others who treat it with unveiled contempt. In the first category comes Mrs. *X*, who hesitates to increase her legacies to godchildren because the amounts have been typed into her draft will. To the second belongs Mr. *Y*, who habitually scribbles over my drafts in an expansive and illegible hand. (Nowadays he has to put up with carbon copies.) And clearly to the second class also belongs Major *Z*, who not so very long ago sent for the conveyance and subsidiary vesting deed relating to his settled estate (one of those title deeds *de luxe* encased in a shining black cover with gilt lettering). When the document was eventually recovered, an inquisitive member of the staff examined it and found that the plans thereto annexed had been therefrom annexed—very neatly, it must be said, with a sharp razor blade. Major *Z* was surprised to learn that this was deemed irregular; when his salmon-fishing beats had been regulated by reference to the plan (which was proving most useful) it would be returned, and so, in due course, it was.

To these two categories must be added a third—the ambivalent—typified by Mr. *C*, whose idolatry is restricted to his own drafting, so that you have no sooner caught him by the heels in the "paper precision" field than he has vanished into the opposition camp where mutual esteem and knowledge of intentions are paramount. He calls with a lay-drafted commercial agreement and takes me to task for suggesting that his ewe-lamb is woollier than he thought. Such is the staple fare of daily practice. Eventually Mr. *C* is persuaded that the road to litigation is paved with good intentions and the document is examined on its merits.

A more extreme type is Mr. *D*—client of another firm—whose name and identity are unknown to me. His views show some correspondence with those of Mr. *C*, but without any tendency to veering or vacillation. Says Mr. *D*: "When I sold out . . . the turnover was around £2,000 and we merely had each other's note of hand, witnessed and stamped, and it was as valid as if the Lord Chancellor himself had drawn it up . . ." And he adds that his last outburst about his solicitor "was the outcome of nearly fifty years experience with the legal profession, and if I could help it I wouldn't touch one with the proverbial barge-pole." What this outburst was I don't know, but I have not the slightest doubt that his solicitor took it in good part and if it did not brighten the day for him it probably did so for his staff. Mr. *D* is eminently quotable and I see that in correspondence with the other side he gives it as his "firm and confirmed opinion of all branches of the legal profession . . . that they are nothing more (or less) than legal sharks or human carrion types, and at the very best a necessary evil." Though, if you ask me whether it is preferable to be classified as a legal or an illegal shark, offhand the choice seems invidious. I suspect that Mr. *D* enjoys his little joke, for after these fulminations I read this: "I must say that having brought my price down from £1,250 to £1,000 I did not expect to be *mulched* with any legal charges, but being desirous at all times of doing the right thing I will abide by my solicitor's ruling" [italics supplied].

FRIDAY, 8TH

I am told that there are still a few diehards in the profession who remain at daggers drawn with the trust corporations. Admittedly some of the work that was commonly done by the family solicitor (e.g., advising on investments) is as often as not now done by these corporations, but I doubt if we have any reason to complain of that. Also there may be the odd case of some document being drawn or advice given which is not *feræ naturæ* but protected game within our own exclusive preserves. But since I don't (thank heaven) sit on the committee that deals with such things, I have no knowledge of them and can only say that I have never come across such a case in practice. Conversely, I have found that if the trust officers of the big corporation err at all it is on the side of asking for too much advice rather than too little. This is the more remarkable because, if the truth be told, these trust officers—many of them admitted solicitors—are often better informed about the administration of estates and trusts than the solicitors that they consult. This can be galling for both parties, but the fault is not theirs. Very occasionally there will be the odd joker who will write and ask you whether this is a case for applying the rule in *Allhusen* v. *Whittell*. And then when you have advised he will confront you with counsel's opinion taken in another trust. You may then take your choice between distinguishing counsel's opinion or eating humble pie. But by and large I have found these officers unfailingly helpful and considerate.

If all this leaves but an indistinct impression of my partiality for trust corporations, I must correct it; and in any case they are here to stay. But I ask whether the service could not be improved by a little more readiness to commit judicious breaches of trust? Some years ago I remember that the Public Trustee expressed regret in the annual report for a loss chargeable to public funds of 9s. 7d. (I will not vouch for the exact figure but that was about the size of it). I doubt if many trust corporations would deny that their aspiration is much the same, viz., to insulate themselves from loss in the management of these estates and trusts. From one point of view they are right. Trustees have enough trouble with their beneficiaries without adding to them by accepting personal responsibility for breaches of trust: so runs the argument and in appropriate cases one has adopted it. But as with everything else it is a matter of degree and it is the exception that proves the rule. Is the trustee who puts his own personal security at such a high premium that he will not accept even the smallest risk not losing sight of his responsibilities?

Two examples of the type of problem that may confront a trust corporation:—

(*a*) Testator was a member of a Lloyds' non-marine syndicate which has carried on business for thirty years

and has never made a loss. The accounts will not be finally closed for upwards of three years. Gross value of estate, exclusive of Lloyds' deposits, £70,000. Subject to a pecuniary legacy of £7,000 to the daughter, the whole residue is left to the two sons in equal shares; all three are of age. Theoretically there is a risk of an unquantified and unlimited loss on the underwriting account for the year in which the death occurred, though everything points to its being a normal year. Is the distribution (including payment of the pecuniary legacy) to be held up until the underwriting accounts are finally settled? If not, then the corporation as executors must accept some risk, for they will be parting with money which they may not be able to recover. On the other hand, are the children to be kept out of their inheritance for three years or more in order to meet an eventuality which will almost certainly not arise? (The risk, by the way, is not insurable.)

(*b*) Testator died thirty years ago and left his estate to his five children in equal shares, the three sons taking their shares outright and the shares of the two daughters being settled on terms which make it impossible to deal with any problem by consent. Included in his estate were certain shares in Canadian companies liable to Canadian duties but formerly transferable on the London register so that there was then no effective means of securing payment of the duties. The executors, therefore, decided not to pay the duties. The sons' shares were duly made over and the daughters' shares were retained in trust.

A trust corporation is approached and accepts nomination to the trusteeship subject to the beneficiaries making suitable extraneous provision for payment of its fees. At this time nothing is known of the unpaid Canadian duties. The appointment, transfers of stocks and deed of indemnity are prepared and executed by the retiring trustee but left undated. At this point consent to the transfer of the Canadian shares left in the trust is refused by the Canadian authorities on the ground that the Canadian duties and some thirty years' interest remain unpaid.

Letters go back and forth and in the middle of this correspondence the retiring trustee dies. His executors obtain probate and concur in the proposed appointment. Further correspondence reveals that some part of the Canadian duties and interest when paid will not be recoverable from the estate of a deceased son. So if it is to be paid at all it must be on a salvage basis from the daughters' settled shares. The amount involved is a few hundred pounds at most against an estimated value of the daughters' shares of £40,000. The trust instrument, naturally, makes no provision for this irregular situation. Should the trust corporation now decline the trusteeship?

Such are the unrehearsed incidents of executorship and trusteeship. The solutions of these problems are of no immediate interest or relevance. The question is whether it is not illusory to suppose that the best service can be given in this field upon the footing of cast-iron security for the trustees? Truly, I shall not be happy until I read in one of those attractive booklets—perhaps in the paragraph immediately following the "blurb" about security—some subversive matter to the following effect:—

> "It must not be supposed that this corporation administers its trusts without regard to the practical requirements and changing demands of family life, for it is well recognised that these are sometimes of more importance than a literal adherence to the trust instrument. In exceptional circumstances, of which the corporation will be the sole judge—and subject to the provision of suitable indemnities if available and required—the corporation will consider a departure from the strict terms of the trust instrument in the interests of the beneficiaries as a whole or in special cases in order to relieve individual beneficiaries of hardship. It must be understood that this does not preclude the corporation from acting on legal advice or seeking the directions of the court in appropriate cases. But customers may rely upon the corporation to take the same 'common-sense' view of their trust problems as they could properly expect of non-corporate trustees of business experience.
>
> The cost of making good substantiated claims founded upon unsecured—or insufficiently secured—departures from the terms of the trust is accepted as an overhead charge of this service. In a trust managed by non-corporate trustees such claims could be frustrated by the death, disappearance or insolvency of a trustee. The service offered by this corporation protects customers from such risks. We are pleased to report that during the year ended 31st December, 1997, our Breaches of Trust Department report a net loss of £1,657,346 9s. 7d. which will indicate the great value of this special service to customers . . ."

But on reflection I shall certainly not be there to note the loss in 1997. Nobody, by the way, should be alarmed by its size, which naturally takes account of further depreciation of the pound sterling.

What is one to conclude from all this? (1) The best service cannot be given in this field upon the basis of 100 per cent. security. (2) So long as the trust corporations continue to seek that degree of security, we shall continue to advise our clients against appointing them to trusts where a point may have to be stretched or something done that is not in Army Orders. (3) The loss is mutual. (4) We look forward to the day when we may expect corporate (paid) trustees to accept the same measure of risk as is commonly accepted nowadays by non-corporate (unpaid) trustees. (5) It is conjectured that the extra cost of meeting claims arising out of a bolder policy would be offset by the additional business, now, and with reason, diverted from the trust corporations on legal advice.

Week-End Reflections

A client begs to inform me that his business has retired from him. Perhaps that is what is meant by retirement benefits? Another writes that my telephone message on a certain subject caused such elation in the parish that the flag was broken on the parish church. This provides a timely and consoling corrective to the recent expression of a popular view that we are an unproductive lot of drones. As to that, dear Daisy Ashford's Lord Clincham supplied the answer long ago. "Well my man said the good natured earl what I say is what dose it matter we cant all be of the Blood royal can we." And students of this inimitable work will remember that his lordship "added piously at the Day of Judgement what will be the odds." "Mr. Salteena heaved a sigh. I was thinking of this world he said. Oh I see said the Earl but my own idear is that these things are as piffle before the wind."

If Daisy Ashford has no serious competitor, it is because her rival of the same age (nine years) discontinued her audacious novel. All that I know of this is the first sentence of the opening chapter: "I was born in a murky London slum whilst my gay and giddy mother was having a hectic time in Paris."

"Escrow"

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Court of Appeal

DAMAGES: SALE OF MOTOR CAR: REFUSAL TO ACCEPT

Charter *v.* Sullivan

Jenkins, Hodson and Sellers, L.JJ. 25th February, 1957

Appeal from Judge Rawlins, sitting at Aldershot County Court.

The defendant refused to accept delivery of a Hillman Minx motor car which he contracted to buy from the plaintiff, a motor car dealer, at the retail price fixed by the manufacturers. Within ten days the plaintiff resold the car to another purchaser. In an action by the plaintiff for breach of contract, the county court judge awarded the plaintiff £97 15s., the loss of profit on the repudiated sale. The defendant appealed on the ground that the true measure of damages was the difference between the market value and the contract price and that the plaintiff had not suffered any damage since he had subsequently resold the car for the agreed price.

JENKINS, L.J., said that if the defendant had duly performed his bargain the plaintiff would have made on that transaction a profit of £97 15s. The calculation accordingly started with a loss of profit through the defendant's default of £97 15s. That loss was not cancelled or reduced by the sale of the same car to another purchaser, for, if the defendant had duly taken and paid for the car he agreed to buy, the plaintiff could have sold another car to the other purchaser, in which case there would have been two sales and two profits. But the matter did not rest there. The plaintiff must further show that the sum representing the profit he would have made if the defendant had performed his contract had, in fact, been lost. Here he failed, in view of evidence by the plaintiff's sales manager to the effect that the plaintiff could sell all the Hillman Minx cars he could get. This statement came to this, that according to the plaintiff's own sales manager the state of trade was such that the plaintiff could always find a purchaser for every Hillman Minx car he could get from the manufacturers; and if that was right it inevitably followed that he sold the same number of cars and made the same number of fixed profits as he would have sold and made if the defendant had duly carried out his bargain. Upjohn, J.'s decision in favour of the plaintiff dealers in *Thompson (W. L.), Ltd.* v. *Robinson (Gunmakers), Ltd.* [1955] Ch. 177 was essentially based on the admitted fact that the supply of the cars in question exceeded the demand, and his judgment left no room for doubt that if the demand had exceeded the supply his decision would have been the other way. It was for the plaintiff to prove that he did in fact sustain the loss of profit claimed, and this he wholly failed to do. Accordingly, there was no evidence on which the judge could properly hold that the plaintiff had suffered the damage claimed.

HODSON, L.J., agreed.

SELLERS, L.J., delivered a concurring judgment. Appeal allowed.

APPEARANCES: *Dudley Collard* (*Bateman & Co.*, for *Foster, Wells & Coggins*, Aldershot); *Guy Aldous*, Q.C., and *Stanley Waldman* (*Herrington & Carmichael*, Aldershot).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[2 W.L.R. 528**

Chancery Division

WILL: CONSTRUCTION: GIFT OF RESIDUE TO SISTER "AND THEREAFTER TO HER ISSUE"

***In re* Gouk, deceased; Allen *v.* Allen and Others**

Danckwerts, J. 19th December, 1956

Adjourned summons.

By her will dated 28th November, 1953, and made on a will form, a testatrix gave pecuniary legacies to a niece and nephew and continued: "and all the remainder of which I am possessed to my sister . . . and thereafter to her issue." The testatrix died in 1956.

DANCKWERTS, J., said that the language of the will was that of the testatrix, no doubt without legal assistance. The question was what was the effect of the gift beginning with the words "and thereafter"? There was no reference to death, though perhaps many people might think that it meant "after the death of the sister." There were two authorities, not on the words "and thereafter" but on the word "afterwards," which seemed to him a word indistinguishable in meaning from "thereafter," and he thought that he should follow those cases rather than another series which all contained a reference to the death of the person who was held to be a life-tenant. He proposed, therefore, to apply *Byng* v. *Lord Strafford* (1843), 5 Beav. 558, and *In re Percy* (1883), 24 Ch. D. 616, to the present case, and to hold that the testatrix's sister took the residuary estate absolutely. Declaration accordingly.

APPEARANCES: *Maurice Berkeley; A. C. Sparrow; L. H. L. Cohen* (*Enever, Strong, Freeman & Co.*).

[Reported by Mrs. IRENE G R. MOSES, Barrister-at-Law] **[1 W.L.R. 493**

REVENUE: COMPANY: UNDISTRIBUTED PROFITS: WHETHER SHARES ISSUED FOR ADEQUATE CONSIDERATION

Inland Revenue Commissioners *v.* Thornton, Kelley & Co., Ltd.

Wynn Parry, J. 8th February, 1957

Case stated by the Board of Referees.

A company in 1920, by way of capitalisation, applied £10,000 of its surplus assets in the issue of 10,000 ordinary shares to the holders of the company's ordinary shares. In 1951, the company redeemed the shares. The Inland Revenue Commissioners alleged that the issue of the shares in 1920 was not for adequate consideration within the meaning of s. 21 (1) of the Finance Act, 1922, as amended, and that accordingly the amount of £10,000 applied in 1951 in repayment of the amount credited as paid up on the shares had by virtue of the subsection to be treated as income of the members of the company and apportioned among them. The Board of Referees found that the shares were not issued otherwise than for adequate consideration.

WYNN PARRY, J., said that two points had to be kept quite distinct: the aspect of the matter considered in relation to company law, and the aspect of the matter considered in relation to s. 21 (1) of the Finance Act, 1922. Counsel for the company argued that a transaction such as this necessarily involved consideration moving to the company and from the shareholder. If there were not, it would be difficult to see how the shares could be regarded as fully paid up, and nobody doubted that the shares were for all purposes to be regarded as fully paid up. Counsel had relied on certain observations in *Inland Revenue Commissioners* v. *Blott* [1921] 2 A.C. 171 to establish that the company got a benefit. He (his lordship) agreed that purely from the point of view of company law the transaction in question resulted in some benefit to the company. But he also had to consider the question in the light of the relevant part of s. 21 (1), from which it followed that the mere circumstance that there was shown to have been a benefit to the company as part of the consideration involved in the transaction, which enabled one to say that the shares were fully paid up, did not necessarily mean that s. 21 of the Finance Act, 1922, was complied with, and, on the material before him, he found it impossible to say that the provision at the end of subs. (1) had been fulfilled. He would declare that the shares in question were not issued for adequate consideration within the meaning of the section, and the £10,000 had to be written back and treated as available for distribution. Appeal allowed.

APPEARANCES: *Geoffrey Cross*, Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* (*Solicitor of Inland Revenue*); *F. Heyworth Talbot*, Q.C., and *G. B. Graham* (*Hatchett, Jones & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 482**

COMPANY: DIRECTOR: REMOVAL: SUFFICIENT PROPRIETARY INTEREST TO MAINTAIN ACTION

Hayes *v.* Bristol Plant Hire, Ltd., and Others

Wynn Parry, J. 21st February, 1957

Action.

The articles of a company did not require the directors to have any qualifying shareholding in the company; and they did not confer on a director any stipulated amount of remuneration in any year. Article 26 of the company's articles provided: "Subject to the terms of any agreement between them and the company, the directors shall be paid out of the funds of the company by way of remuneration for their services, such sums as the company, in general meeting, may from time to time prescribe." The plaintiff, who was a director of the company, brought an action against the company and three of its directors claiming that at meetings of the board of directors at which he was not present he had been wrongfully expelled from his office of director by the three defendant directors and that another of the defendants had been appointed director in his place. He asked for declarations that the resolutions were invalid and inoperative, and consequential injunctions. The defendants took a preliminary point of law that the action was misconceived on the ground that the plaintiff had not a sufficient proprietary interest in the company to maintain the action.

WYNN PARRY, J., said that the nearest case to the present was *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, which raised exactly the same question as that which arose in the present case. There, Jessel, M.R., said (at p. 612): "In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board." The defendants distinguished that case from the present on those two statements. The Master of the Rolls also said: "Besides that he is in a position of a shareholder . . . and he has a right . . . . to receive remuneration for his services . . . ." Counsel had urged that that phrase should be construed as applying only where the articles in question gave an express right, for instance, by reference to a specific sum, to a director to receive remuneration in each year; but in his view it would be wrong to give such a narrow meaning to the phrase. He was not prepared to say that art. 26 gave no more than a *spes successionis*. It gave a director a right, if the company decided to pay the directors in any year for their services, to share in that remuneration, and that was more than a *spes successionis*; it was for the purposes of the present problem a sufficient proprietary interest. He was not justified in the circumstances in bringing the action to an end at this stage, and it must proceed. Preliminary objection not allowed.

APPEARANCES: *Charles Russell*, Q.C., and *Nigel Warren* (*Robins, Hay & Waters*, for *Burges, Salmon & Co.*, Bristol). *J. B. Lindon*, Q.C., and *Michael Wheeler* (*Ralph Bond & Rutherford*, for *Veale & Co.*, Bristol).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 499

RATING: "SOCIAL WELFARE": THEOSOPHICAL SOCIETY

Berry *v.* St. Marylebone Borough Council

Wynn Parry, J. 22nd February, 1957

Adjourned summons.

The plaintiff, on behalf of the Theosophical Society in England, asked whether or not that society was, under s. 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, an organisation ". . . which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare." An "organisation" within the meaning of the sub-section is entitled to a measure of relief from rates. According to its rules, the main objects of the society were: "(1) To form a nucleus of the Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour. (2) To encourage the study of comparative religion, philosophy and science. (3) To investigate unexplained laws of nature and the powers latent in man."

WYNN PARRY, J., said that it was clear that the society was not established or conducted for profit. The House of Lords had held that the first object was not charitable and for the plaintiff to succeed she must demonstrate that the first object was for "social welfare" purposes. It was virtually impossible to attempt to define this phrase, but it was probably necessary to discover in the operation of the undertaking some direct impact on the proposed beneficiary and, while regarding it as no more than an indication and not a definition of the phrase "Social welfare", his lordship would adopt the phrase suggested by counsel for the defendants, namely, the provision of benefits or facilities which tend directly to improve the health and condition of life of the class of persons concerned. Accordingly, even accepting that every activity which might be undertaken under the first object could be described as a good object, whatever be the true scope of the phrase "social welfare," the object was too wide to cover no more than the activities which might reasonably be said to fall within that phrase, and therefore the main objects of the society were not concerned with the advancement of social welfare. Declaration accordingly.

APPEARANCES: *G. G. Honeyman*, Q.C., and *D. Taverne* (*Gibson & Weldon*, for *Berry & Berry*, Tunbridge Wells); *Geoffrey Cross*, Q.C., and *John L. Arnold* (*Sharpe, Pritchard & Co.*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 495

Queen's Bench Division

FACTORY: DANGEROUS MACHINERY: OVERHEAD TRAVELLING CRANE

Carrington *v.* John Summers & Sons, Ltd.

Streatfeild, J. 9th November, 1956

Action.

The plaintiff was employed by the defendants as a crane attendant at their steelworks. The crane in question (known as a "Goliath crane") consisted of a large transverse girder about 94 feet long and some 30 feet from the ground which spanned a shallow pit used as a scrap dump and travelled on wheels along single rails. These rails rested on sleepers laid a few inches above ground level along the sides of the dump. The girder was supported by two pairs of legs at the base of which was a wheelbox. For a distance of about 20 yards the ground level had been raised and there was a space of only 3¾ inches between the top of the chair on which the rail was mounted and the underside of the side-member of the wheelbox. In the course of his employment the plaintiff slipped on a piece of scrap metal, and his left foot was caught in the space between the underside of the wheelbox and the ground. He alleged, *inter alia*, that the defendants were in breach of their statutory duty under ss. 14 (1) and 24 (7) of the Factories Act, 1937.

STREATFEILD, J., said that s. 14 applied in general to the fencing of dangerous parts of machinery, whereas s. 24 dealt with cranes and lifting machines from the point of view of their construction. Neither in the authorities nor in s. 24 itself, comparing it with s. 10 of the Factory and Workshop Act, 1901, was there any justification for the submission that s. 24 could not exist side by side with s. 14, and s. 24 did not prevent the operation of s. 14 if that section was otherwise appropriate, but on the facts, the defendants were not in breach of s. 14. It was said that there was a breach of s. 24 (7) because this crane was an overhead travelling crane. It was submitted that this was an overhead crane which travelled and that it mattered not whether it travelled on an overhead gantry or on the ground. In considering the words of the subsection, one must take their natural meaning and in the order in which they appeared. The subsection did not say "an overhead crane which travels." On construction, an overhead travelling crane within the meaning of subs. (7) was a crane which travelled overhead, for example, on a gantry rail some distance above the ground, and did not apply to the crane in the present case. His lordship found the defendants liable at common law. Judgment for the plaintiff.

APPEARANCES: *Norman Richards*, Q.C., and *Geoffrey Howe* (*Russell Jones & Walker*); *Lloyd-Jones*, Q.C., and *W. L. Mars-Jones* (*Laces & Co.*, Liverpool).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 504

SHIPPING: EFFECT OF HAGUE RULES ON CHARTER-PARTY

Anglo-Saxon Petroleum Co., Ltd. *v.* Admastos Shipping Co., Ltd.

Devlin, J. 1st February, 1957

Case stated by an umpire.

On 25th May, 1950, the charterers chartered the tanker *Saxon Star* from the owners by a consecutive voyage charter for a period of eighteen months. Clause 52 of the charter-party provided that the paramount clause was "to be incorporated in this charter-party" and attached to the charter-party on a typewritten sheet of paper was the paramount clause, which provided: "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the United States . . . which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further." At various stages during her service the vessel broke down and as a result she lost in all 106 days. The charterers' claim for some £80,000 in respect of loss of freight went to arbitration and the umpire made an interim award, but before he could assess the damages the parties agreed the following questions of law for the decision of the court: (1) Whether the United States Carriage of Goods by Sea Act, 1936, which incorporated the Hague Rules, affected the rights and liabilities of the parties under the charter-party. (2) Whether, under the charter-party, any material provisions of the Act affected the rights and liabilities of the parties in connection with non-cargo-carrying voyages. (3) Did the words "loss or damage" in s. 4 (1) and (2) of the Act relate only to physical loss or damage to goods?

DEVLIN, J., held (1) that the clause paramount was incorporated in the charter-party and the words "this bill of lading" in the clause being a *falsa demonstratio* should be read as "this charter-party." Accordingly the rights and liabilities of the parties under the charter-party were affected by the United States Carriage of Goods by Sea Act. (2) That the immunity of the ship-owner for loss or damage arising or resulting from unseaworthiness unless caused from want of due diligence within s. 4 (1) of the United States Carriage of Goods by Sea Act did not extend to non-cargo-carrying voyages. (3) That the words "loss or damage" in s. 4 (1) and (2) of the Act did not relate only to physical loss or damage to goods. Award upheld.

APPEARANCES: *Ashton Roskill*, Q.C., and *T. G. Roche*, Q.C. (*Constant & Constant*); *A. A. Mocatta*, Q.C., and *S. O. Olson* (*Waltons & Co.*).

(Reported by J. D. PENNINGTON, Esq., Barrister-at-Law) [2 W.L.R. 509

FACTORY: DERMATITIS FROM WEST AFRICAN HARDWOOD DUST: NO NEGLIGENCE OR BREACH OF STATUTORY DUTY

Graham *v.* Co-operative Wholesale Society, Ltd.

Devlin, J. 8th February, 1957

Action.

The plaintiff, a cabinet maker, was employed by the defendants in a furniture factory where, about 15 yards from his place of work, a sanding machine gave off a quantity of fine wood dust into the air. Extractors had been fitted to the machine and a hessian curtain placed round it, but enough dust escaped from the cubicle to settle on the plaintiff's skin. In February, 1954, as a result of the settlement on his skin of dust from West African hardwoods passing through the sanding machine, the plaintiff contracted dermatitis. The ventilation in the factory was adequate for ordinary purposes, but it did not remove enough of the wood dust to prevent the remainder from being a source of danger. West African hardwoods only began to be used in any substantial quantity in this country after 1945, when the defendants first started to use them, but by 1953 about 80 per cent. of the wood passing through the sanding machine in the defendants' factory was West African hardwood. Suspicion of West African hardwoods as a source of dermatitis did not begin to be aroused until 1952, and the defendants did not know that the wood was a source of danger; they got bulletins issued by the Furniture Trade Development Council and also circulars from Government departments and laboratories, which material was the equal of that commonly received in the trade, but there was no evidence whether or not that material contained any reference to West African hardwoods as a source of dermatitis. The plaintiff, alleging negligence and breach by the defendants of their statutory duty under ss. 4 (1) and 47 (1) of the Factories Act, 1937, claimed damages.

DEVLIN, J., said that it was the duty of employers, at any rate in trades where there were known hazards, such as dermatitis, to take reasonable steps to keep up to date their knowledge of new developments and discoveries which might reveal hitherto unsuspected sources of danger to their workmen. That did not mean that they must make independent researches, and the test to be applied in determining whether the defendants were negligent in not knowing of the recent discovery of the danger from West African hardwoods was whether they had acquired information that was commonly known in the trade, and whether they had been guilty of obvious neglect. The defendants had got material which was the equal of that commonly got in the furniture trade and, in the absence of evidence that it contained something which ought to have put them on their guard which they had missed, it was impossible to assume against them that they had not read it with due attention. The plaintiff's claim at common law, therefore, failed on the ground that he had not proved that the defendants knew or ought to have known that the wood dust was a source of danger. In *Ebbs* v. *James Whitson & Co., Ltd.* [1952] 2 Q.B. 877 the Court of Appeal had held that s. 4 of the Factories Act, 1937, was to be regarded as a whole and as dealing with ventilation; in his lordship's view that section, on its proper construction, referred only to adequate ventilation for ordinary purposes by the circulation of fresh air and did not include any requirement for the provision of exhaust appliances to remove dust from the point of egress so as to prevent it entering the air. Accumulation of dust in the second part of s. 47 (1) meant an accumulation of deposited dust, and the settlement of dust on the plaintiff's skin which caused the dermatitis could not be regarded as accumulating upon him within the meaning of the section. That section, therefore, had no application and the result was that the plaintiff's claim failed. Judgment for the defendants.

APPEARANCES: *Charles Doughty*, Q.C., and *R. T. Monier-Williams* (*Shaen, Roscoe & Co.*); *John Thompson*, Q.C., and *Colin Fawcett* (*H. Smith*, for *N. C. Wright*, Manchester).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [1 W.L.R. 511

Probate, Divorce and Admiralty Division

HUSBAND AND WIFE: NULLITY: FOREIGN DECREE: JURISDICTION: DESERTION: JEWISH BILL OF DIVORCEMENT

Corbett *v.* Corbett

Barnard, J. 29th January, 1957

Undefended petition for a declaration of the validity of a marriage and for the dissolution of that marriage.

The parties were married in December, 1942, in the part of Jerusalem which is now in the State of Israel. The marriage was according to the rites of the Jewish faith. Before that marriage took place, the wife had married a man called Craig on 1st April, 1936, at the Latin Patriarchate in Jerusalem. Both she and Craig thereafter resided in Jerusalem, and there was no doubt that the wife, at the time she went through that ceremony of marriage, was domiciled in Palestine. The domicile of her then husband was not known. Early in 1940, according to the evidence of the wife, the 1936 ceremony of marriage purported to have been annulled by an ecclesiastical court, the Latin Patriarchate, and, on the strength of that annulment, the wife married her second husband in December, 1942. It appeared to have been realised at some time after the second marriage that the purported annulment of the first marriage was ineffective, and in January, 1946, the District Court of Jerusalem declared the marriage of 1936 to be invalid. Expert evidence was given that the judgment of the district court in 1946 would be regarded as a valid annulment as the district court, according to the law of Israel, had jurisdiction in nullity suits. The parties left Palestine and eventually came to England in 1952. On their arrival the husband left the wife and the child of the marriage in circumstances amounting to desertion. The wife did her utmost to effect a reconciliation, but her efforts failed; and on 18th December, 1952, both husband and wife being of the Jewish faith, the husband obtained a *get*

or Jewish bill of divorcement from the Beth Din in London. This certified that the wife had received her *get* on 18th December, 1952, and that she was free to marry again in accordance with Jewish religious law after ninety clear days from the aforementioned date. The wife wanted to remain on friendly terms with her husband, and apparently still thought that, even in spite of her consenting to this bill of divorcement, there was a chance of their getting together again. The husband, however, went to Canada, and in July, 1956, after further efforts in correspondence, the wife filed a petition asking for a declaration that the marriage of 13th December, 1942, was a valid marriage and seeking the dissolution of that marriage on the ground of the husband's desertion.

BARNARD, J., referred to Dicey's Conflict of Laws, 6th ed., p. 381, r. 73, and said that if the English distinction between void and voidable marriages was to be applied the marriage in question would obviously be regarded as void. It was well established that the celebration of a void marriage in England, as distinct from a voidable marriage, was sufficient to confer nullity jurisdiction upon the English courts, and it would be wholly illogical in those circumstances to refuse to recognise a similar jurisdiction exercised by courts of a foreign country. His lordship referred to and considered *Mitford* v. *Mitford and Von Kuhlmann* [1923] P. 130, and said that he had no hesitation in coming to the conclusion that the English courts should recognise the decree of the District Court in Jerusalem. That meant that the ceremony of marriage entered into between the wife and Craig on 1st April, 1936, was an invalid marriage and therefore there was nothing to prevent her marrying the present husband, as she did, on 13th December, 1942. His lordship said that he was also satisfied that the husband could not have obtained the *get* or bill of divorcement without the consent of the wife; the problem was whether or not the wife, by consenting to that bill of divorcement, terminated the husband's desertion. In *Joseph* v. *Joseph* [1953] 1 W.L.R. 1182 the Court of Appeal had upheld an order dismissing a wife's petition on the ground of desertion on the ground that she had consented to a Jewish bill of divorcement. But the facts of that case were to be distinguished. Where desertion was running and there was then a bill of divorcement, the parties to the suit being of the Jewish faith, the court must consider the effect of the *get* in the light of all the surrounding circumstances of the particular case before the court. It was clear from the evidence that the wife in this case never really consented to the husband leaving her and remaining separate from her; and upon that evidence he (his lordship) was able to hold that in spite of the bill of divorcement the husband continued in desertion. The wife was therefore entitled to a decree *nisi* on the ground of desertion. Decree *nisi*.

APPEARANCES: *John B. Latey* (*Mead & Darby*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] [1 W.L.R. 486

Court of Criminal Appeal

CRIMINAL LAW: EXPLOSIVE SUBSTANCES: KNOWLEDGE THAT SUBSTANCE IS EXPLOSIVE

R. *v.* Hallam

Lord Goddard, C.J., Stable, Cassels, Gorman and Hinchcliffe, JJ.

25th February, 1957

Appeal against conviction.

The appellant was charged on an indictment preferred under the Explosive Substances Act, 1883, s. 4 (1), with "knowingly [having] in his possession . . . certain explosive substances . . . under such circumstances as to give rise to a reasonable suspicion that they were not in his possession for a lawful object." The recorder directed the jury that for the purposes of the subsection it did not matter whether or not the appellant knew that the substance in his possession was explosive. The jury convicted the appellant, who was sentenced to three years' imprisonment.

LORD GODDARD, C.J., delivering the judgment of the court, said that the whole question was whether the word "knowingly" meant that a person must know, not only that he had a parcel or a substance in his possession, but also that it was an explosive. The recorder in charging the jury was applying *R.* v. *Dacey* (1939), 27 Cr. App. R. 86, but with all respect to that case the court did not take the same view. The clear meaning of the section was that the person must not only knowingly have in his possession the substance, but must know that it is an explosive substance. If, of course, there was evidence that the man had the substance in his possession, and evidence of circumstances which gave rise to a reasonable suspicion that he had not got it for a lawful object, the jury were then entitled to infer that he knew it was an explosive substance. The story which the appellant told as to how he came into possession of this material and what he did with it was a story which no jury under any circumstances would believe. Accordingly, although the court decided the point of law in the appellants favour, and although it differed from the decision in *R.* v. *Dacey*, it came to the conclusion that it was a case in which it should apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, and dismiss the appeal. Appeal dismissed.

APPEARANCES: *Gerald Gardiner*, Q.C., and *Brendan J. Shaw* (*Registrar, Court of Criminal Appeal*); *Sir Harry Hylton-Foster*, Q.C., S.-G., and *J. H. Buzzard* (*Director of Public Prosecutions*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [2 W.L.R. 521

UNLAWFUL WOUNDING: PLEA OF SELF-DEFENCE: ONUS

R. *v.* Lobell

Lord Goddard, C.J., Cassels and Gorman, JJ. 11th March, 1957

Appeal against conviction.

At the trial the sole defence which there was some evidence to support, set up by the appellant was that in inflicting the wound he was acting in self-defence. Jones, J., summing up, directed the jury, and several times stressed that it was for the defence to establish that plea to their satisfaction. The jury convicted the appellant and he appealed on the grounds that the judge's direction that the burden of proving this defence was on the accused was erroneous, and also that the judge did not direct the jury that the degree of proof required from the defence was of a less degree than that required from the prosecution.

LORD GODDARD, C.J., reading the judgment of the court, said that in directing the jury that it was for the defence to establish to their satisfaction the plea of self-defence the judge had the support of a passage from the summing up in *R.* v. *Smith* (1837), 8 C. & P. 160, a passage which had for many years appeared in Archbold's Criminal Pleading and Practice as the proper directions to be given in such cases. But in the opinion of the court the cases of *R.* v. *Woolmington* [1935] A.C. 462 and *R.* v. *Mancini* [1942] A.C. 1 established that in murder or manslaughter the rule that the onus was on the prosecution permitted of no exception except as to proof of insanity. In *Chan Kau* v. *R.* [1955] A.C. 206 that was stated in terms by Lord Tucker, who referred to *R.* v. *Smith* and said that the passage from the summing up quoted in Archbold clearly needed some modification in the light of modern decisions. It must, however, be understood that maintaining the rule that the onus always remained on the prosecution did not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue was raised, or, indeed, give any evidence on the subject at all. If an issue relating to self-defence were to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence. But there was a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth was that the jury must come to a verdict on the whole of the evidence that had been laid before them, and if on a consideration of all the evidence they were left in doubt whether the killing or wounding might not have been in self-defence the proper verdict would be not guilty. A convenient way of directing the jury was to tell them that the burden of establishing guilt was on the prosecution, but that they must also consider the evidence for the defence which might have one of three results; it might convince them of the innocence of the accused, or it might cause them to doubt, in which case the defendant was entitled to an acquittal, or it might, and sometimes did, strengthen the case for the prosecution. It was perhaps a fine distinction to say that before a jury could find a particular issue in favour of a defendant he must give some evidence on which it could be found, but nonetheless the onus remained on the prosecution; what it really amounted to was that if in the result the jury were left in doubt, the verdict should be not guilty. Had the judge gone on to say that it

was not for the defence to establish the plea with the same degree of certainty as was necessary to establish a case for the prosecution, it might have been that the court would have had to consider whether it was a case for dismissing the appeal on the ground that there had been no substantial miscarriage of justice. But that it was the duty of the defence to satisfy them on that point was on several occasions stressed in the summing up, and the court did not feel by any means satisfied that if what they had now held was the correct direction had been given, the jury would have been sure to have convicted. For those reasons the court had quashed the conviction. Appeal allowed.

APPEARANCES: *J. R. D. Crichton*, Q.C., and *I. R. Taylor* (*A. E. M. West & Co.*, Manchester); *Sir Noel Goldie*, Q.C., and *Donald Summerfield* (*Sharpe, Pritchard & Co.*, for *P. B. Dingle*, Manchester).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [2 W.L.R. 524

"THE SOLICITORS' JOURNAL," 21st MARCH, 1857

On the 21st March, 1857, the SOLICITORS' JOURNAL referred to the forthcoming election, saying that "all over the United Kingdom are ringing the notes of preparation for an occasion which, while it gratifies that passion for excitement which is common to most of us, ministers at the same time to that itching for personal gain which is certainly not the less generally diffused. . . . We do not deny that there are many among those . . . who aspire to seats in the future Parliament, who have the sincerest desire for their country's welfare and who would recoil from any idea of hazarding that welfare for their own individual advancement. But even these are, perhaps unconsciously, influenced by self-seeking motives mixed with their purer patriotism. If not desirous of place or emolument, their yearning is after reputation; or they have accustomed themselves to some political, social or religious hobby and they long to be again in the saddle; or they feel a craving for work and the stimulus of public life—a calling for the committee room and a weakness for parliamentary papers. . . . But if the candidates are thus influenced by a variety of motives, what shall we say of the electors? One man votes from the wisdom inspired by the neighbouring tap-room; another because he hopes that his nephew may obtain a small appointment; a third in obedience to his Sunday paper; and a fourth because his wife's baby has been kissed by the white-waistcoated canvasser."

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

House of Commons Disqualification Bill [H.C.] [13th March.

Public Health Officers (Deputies) Bill [H.C.] [12th March.

Read Second Time:—

Church of Scotland (Property and Endowments) Bill [H.L.] [12th March.

Customs Duties (Dumping and Subsidies) Bill [H.C.] [14th March.

Read Third Time:—

Liverpool Hydraulic Power Bill [H.L.] [12th March.

Northern Ireland (Compensation for Compulsory Purchase) Bill [H.C.] [12th March.

Rating and Valuation Bill [H.C.] [14th March.

Wakefield Corporation Bill [H.L.] [12th March.

In Committee:—

Magistrates' Courts Bill [H.L.] [12th March.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time:—

Consolidated Fund (No. 2) Bill [H.C.] [14th March.

To apply certain sums out of the Consolidated Fund to the service of the years ending on the thirty-first day of March, one thousand nine hundred and fifty-six, one thousand nine hundred and fifty-seven, and one thousand nine hundred and fifty-eight.

Export Guarantees Bill [H.C.] [13th March.

To amend the Export Guarantees Acts, 1949 to 1952.

Read Second Time:—

British Transport Commission Bill [H.C.] [13th March.

Parish Councils (Miscellaneous Provisions) Bill [H.C.] [15th March.

Representation of the People (Amendment) Bill [H.C.] [15th March.

Thermal Insulation (Industrial Buildings) Bill [H.C.] [15th March.

White Fish and Herring Industries (No. 2) Bill [H.C.] [12th March.

Read Third Time:—

Nurses Bill [H.L.] [12th March.

Nurses Agencies Bill [H.L.] [12th March.

B. QUESTIONS

VALUATION COURTS (RATING APPEALS)

Asked whether he was aware that in South West Middlesex valuation courts were overloaded and some twenty cases were heard at a time in a rather slipshod fashion and whether it was not possible to increase the number of courts in that area, or alternatively, to appoint some qualified people who would know what they were doing in adjudicating on these valuation cases, Mr. BEVINS said that it was at the discretion of the chairman of the panel to decide how often courts were called. As to qualification of the members of the courts, he thought it had always been the view of the House of Commons that those courts should not consist entirely of legal gentlemen, but also people who had a knowledge of the district. The Minister was aware of the difficulties in that area of Middlesex, but there were appeals to the Lands Tribunal. [12th March.

RENTED HOUSES (FURNITURE, FITTINGS AND FIXTURES)

Asked whether he was aware that advertisements in provincial newspapers revealed that offers were being made for furniture and fittings in order to obtain the tenancies of rented houses, and, as it was an offence to accept such offers but not an offence to make them, whether he would amend the Housing Act to make the giver as well as the receiver equally guilty of an offence, Mr. H. BROOKE said that it was not an offence to accept a reasonable price for furniture, fittings or fixtures; it became an offence only if the price asked was unreasonable and therefore amounted to a premium, and if the particular tenancy was controlled. Advertisements of the kind referred to could not, therefore, be declared illegal. [12th March.

RENT BOOKS (INFORMATION)

Asked by Mrs. BUTLER whether he would make a regulation in accordance with s. 14 (1) (*b*) of the Rent, etc., Restrictions (Amendment) Act, 1933, whereby amongst the particulars included in the rent book the landlord would be required to insert the rateable value of the hereditament, or, if the dwelling was part of the hereditament, then an apportionment of the rateable value, Mr. H. BROOKE said he intended to consider this together with other information for prescription in rent books when the Rent Bill became law. [12th March.

RENT TRIBUNAL CASES

Mr. BEVINS gave the following figures for the number of decisions of rent tribunals and the number of such decisions in which the rent was reduced.

—	Furnished Houses (Rent Control) Act, 1946	*Section* 1 Landlord and Tenant (Rent Control), Act 1949
Decisions	80,259	16,744
Rent reduced	49,024	9,604

The figures in each case run from the coming into operation of the Act to 31st December, 1956. [12th March.

WAR DAMAGE REPAIRS (RENT)

Asked whether he would introduce legislation to ensure that moneys received by a landlord from the War Damage Commission and spent by him on repairs to property should not entitle him to increase rents to tenants under the Housing Repairs and Rents Act, 1954, Mr. BEVINS said that this was already prevented by para. 8 (*b*) of Sched. II to the Act of 1954. [12th March.

PLANNING: SETTLEMENT OF PT. II CLAIMS

Mr. BEVINS said that normal conditions had not yet been reached in the time taken to settle claims for compensation under Pt. II of the Town and Country Planning Act, 1954, because of the backlog of earlier cases payable under Pt. V. The latter were now largely cleared, and settlement of the Pt. II cases was in consequence speeding up. [12th March.

STATUTORY INSTRUMENTS

Appointment of the Port of Liverpool (Amendment) Order, 1957. (S.I. 1957 No. 337.)

Birmingham Municipal Bank Order, 1957. (S.I. 1957 No. 350.) 5d.

Fatstock (Guarantee Payments) Order, 1957. (S.I. 1957 No. 370.) 7d.

Lancashire River Board (Fisheries) Order, 1957. (S.I. 1957 No. 368.) 5d.

London–Cambridge–King's Lynn Trunk Road (Milton Diversion) Order, 1957. (S.I. 1957 No. 379.) 5d.

London–Carlisle–Glasgow–Inverness Trunk Road (Salford Road, Botton, Diversion) Order, 1957. (S.I. 1957 No. 355.) 5d.

London–Edinburgh–Thurso Trunk Road (Tempsford Bridge Diversion) Order, 1957. (S.I. 1957 No. 366.) 6d.

London Traffic (Prescribed Routes) (Bethnal Green and Shoreditch) Regulations, 1957. (S.I. 1957 No. 360.) 5d.

London Traffic (Prescribed Routes) (Croydon) (No. 3) Regulations, 1957. (S.I. 1957 No. 361.) 5d.

London Traffic (Prescribed Routes) (Slough) Regulations, 1957. (S.I. 1957 No. 362.)

London Traffic (Prescribed Routes) (Stepney) (No. 2) Regulations, 1957. (S.I. 1957 No. 363.) 5d.

Milk (Special Designations) (Specified Areas) Order, 1957. (S.I. 1957 No. 391.) 5d.

Motor Fuel Order, 1957. (S.I. 1957 No. 369.) 5d.

Motor Vehicles (Construction and Use) (Amendment) Regulations, 1957. (S.I. 1957 No. 359.) 8d.

Motor Vehicles (Variation of Speed Limit) Regulations, 1957. (S.I. 1957 No. 340.) 6d.

Oil in Navigable Waters (Records) Regulations, 1957. (S.I. 1957 No. 357.) 6d.

Oil in Navigable Waters (Transfer Records) Regulations, 1957. (S.I. 1957 No. 358.) 5d.

Stopping up of Highways (Berkshire) (No. 3) Order, 1957. (S.I. 1957 No. 351.) 5d.

Stopping up of Highways (Bradford) (No. 1) Order, 1957. (S.I. 1957 No. 371.) 5d.

Stopping up of Highways (Cornwall) (No. 2) Order, 1957. (S.I. 1957 No. 364.) 5d.

Stopping up of Highways (Derbyshire) (No. 5) Order, 1957. (S.I. 1957 No. 365.) 5d.

Stopping up of Highways (Dewsbury) (No. 1) Order, 1957. (S.I. 1957 No. 352.) 5d.

Stopping up of Highways (Gloucestershire) (No. 3) Order, 1957. (S.I. 1957 No. 378.) 5d.

Stopping up of Highways (Leeds) (No. 2) Order, 1957. (S.I. 1957 No. 372.) 5d.

Stopping up of Highways (London) (No. 19) Order, 1957. (S.I. 1957 No. 373.) 5d.

Stopping up of Highways (Sheffield) (No. 1) Order, 1957. (S.I. 1957 No. 374.) 5d.

Stopping up of Highways (Sheffield) (No. 2) Order, 1957. (S.I. 1957 No. 375.) 5d.

Stopping up of Highways (Warwickshire) (No. 5) Order, 1957. (S.I. 1957 No. 353.) 5d.

Teachers (Superannuation) (Scotland) Regulations, 1957. (S.I. 1957 No. 356 (S. 17).) 2s. 2d.

Wages Regulation (Aerated Waters) (Scotland) Order, 1957. (S.I. 1957 No. 376.) 5d.

Wages Regulation (Paper Bag) (Holidays) Order, 1957. (S.I. 1957 No. 377.) 8d.

Worcester–Wolverhampton–South of Stafford Trunk Road (Battlefield, near Wombourn, Diversion) Order, 1957. (S.I. 1957 No. 354.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

CORRESPONDENCE

[The views of our correspondents are not necessarily those of The Solicitors' Journal]

"Praying a Tales"

Sir,—I found your paragraph on the above in THE SOLICITORS' JOURNAL of the 9th March most interesting, and it reminds me that the procedure is, or at any rate was, not so well known as it might be. I say this in recollecting that two counsel of the first magnitude, Sir Nathaniel and Sir Peregrine, when appearing some thirty years ago in *Potte* v. *Kettle*, were both ignorant of the expression. As the case was settled, it did not, of course, appear in the Law Reports, but is recounted in "Forensic Fables," by "O," at p. 45, and makes most interesting reading.

J. D. MASON.

Cardiff.

Wills and Bequests

Mr. William Healy Darbyshire, solicitor, of Blackpool, left £7,970 (£7,908 net).

OBITUARY

MR. E. H. BULLOCK

Mr. Ernest Henry Bullock, solicitor and town clerk of Hull, died on 6th March, aged 46. He was admitted in 1936.

MR. H. K. CLARK

Mr. Herbert Kelsey Clark, solicitor, of Lymington, Hants, died recently, aged 89. He was Registrar of Lymington County Court from 1915–37, and was admitted in 1896.

"THE SOLICITORS' JOURNAL"

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